SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 695

MINNIE WHITEHORN, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The above-named petitioner, by her counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this cause.

OPINION

The opinion below, entered July 19, 1961, has not yet been officially reported, but is unofficially reported at 293 F. 2d 658, and is printed as an Appendix to this petition at page 1a, *post*.

JURISDICTION

The judgment below was entered on July 19, 1961. A petition for rehearing was denied October 4, 1961. By an order signed by the Chief Justice of the United States on December 16, 1961, the time for filing this petition was extended to and including February 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255 (1).

QUESTIONS PRESENTED

Preliminary Consideration: The Court below stated the question to be (Appendix 6a; 293 F. 2d 658, 661), as follows:

> The issue is whether the right to use the six fishing stations, with easements on the public lands at Celilo Falls no different from those of similar stations, were her individual private property or a part of the communal property of the tribe."

The Court below has misconceived the petitioner's position. The petitioner is not denying that the Confederated Tribes and Bands have certain rights in this property. Petitioner and those similarly situated assert that they too have a compensable interest in such property, and so the petitioner believes that—

The question presented is: If the laws, usages and customs observed by an Indian tribe from remote times, have recognized a private right which was inheritable and exclusive in tribal property (the use and occupancy of these six fishing stations), and if the United States appropriates the same, is the United States liable to

compensate the individuals for taking their property rights in such tribal property?[1]

STATEMENT OF THE CASE

From the *findings of fact* of the Court below, the Confederated Tribes and Bands of the Yakima Nation of Indians had, from time immemorial, and up to the present day, a custom of recognizing that, to the exclusion of all others, families of such Indians could occupy, use and fish from a fishing station in their tribal fishing area which the Confederated Tribes and Bands had reserved to themselves in their treaty with the United States in 1855; the *findings of fact* further provide that such custom recognized a right of inheritance in the family line of the possessors of such locations.

The petitioner, Minnie Whitefoot, a member of such Confederated Tribes and Bands, together with her ancestors in lineal consanguinity from remote times, occupied, used and fished at six such fishing stations, held pursuant to such custom, at the famous and fabulously rich Celilo Falls fishing area on the Columbia River, states of Oregon and Washington.

The respondent, United States of America, has "taken" these fishing locations, inundating them by the reservoir behind The Dalles Dam.

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[1] We suggest that the Department of Justice concurs in this statement of the question because its answer to petitioners' petition for rehearing in the Court below states:

> "The court described the particular Indian custom involved here but concluded that merely because a certain family might have had some right, recognized from generation to generation, to exclude others from using the same stations, was not any indicium of ownership."

This action was commenced to seek compensation to her for the taking of such six fishing locations. Thus this action is to be distinguished from a seeking of compensation for the Confederated Tribes and Bands of Indians who have been paid for their *tribal* rights.

In its *opinion* the Court below held (1) that it was factually impossible for individual Indians in general throughout the United States to have a private right in tribal property; and (2) that, because the tribal officers of these Confederated Tribes and Bands, the Congress and the Corps of Engineers at various times may have had the impression that the possession by individual Indians of fishing locations pursuant to such custom of possession and inheritance did not give rise to a property right in such individual Indians, it was therefore legally impossible for individual Indians in general ever to have a private right in tribal fisheries. The Court then concluded as a matter of law that such individual Indians could not recover compensation for the taking of the property by the United States.

STATUTES

Article III of the Yakima Treaty of June 9, 1855, 12 Stat. 953, provides as follows:

> "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The petitioners are not basing their claim on the appropriation act which authorized the Corps of Engineers to negotiate and pay the respective tribes interested in the fisheries to be inundated by The Dalles Dam, but since the Court below and the United States are relying upon such statute, we include such appropriation act in part as follows:

> 67 Stat. 197, 198, Appropriation Act for the Civil Functions of the Army, 1953
>
> "Provided, further, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation, or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at, or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the Government incident to the construction, operation, or maintenance of The Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

REASONS RELIED UPON FOR THE ISSURANCE OF THE WRIT

1. This is a test case for about five hundred Indian fishermen, having claims similar to the petitioner's, which fishermen likewise had their fishing stations inundated by the reservoir behind The Dalles Dam, a federal installation. It is therefore an important question in the administration of Indian affairs by the United States.

2. Petitioners believe that the Department of Justice likewise regards this action as a test case. At the time of the filing of this action, the United States had still in her possession $15,019,640 which was the consideration that she agreed to pay the Confederated Tribes and Bands for their *tribal* rights in the Celilo Falls area. Upon the filing of this action the Justice Department forbade the payment of this fund to the Confederated Tribes—obviously in recognition of the fact that payment to the tribes pursuant to Congressional appropriation above mentioned may have overlooked the individual rights as distinguished from tribal rights. Ultimately, in order to permit partial payment to the Indian Tribes, the Justice Department required the Confederated Tribes to indemnify[2] the United States as to any partial distribution of such fund for any loss she might sustain because of the action by this petitioner and those similarly situated—obviously again in apprehension that rights other than tribal might be involved. Some eleven and one-half million dollars has been so distributed. The balance of three and one-half million is still in the possession of the United States and is presumably under her control. Thus, the Department of Justice has "required" an amount equal to the entire $15,019,640 be obligated to indemnify the United States for any loss the United States might sustain because of the action by plain-

[2] Petitioners do not agree that the indemnity agreement is valid, because finding 18 of the instant action makes it clear that the Corps of Engineers, though aware of the existence of this custom of possession and inheritance, purchased only what the Confederated Tribes as such owned; petitioners therefore believe the indemnity agreement is invalid for lack of consideration. Nevertheless the agreement illustrates the seriousness with which the Department of Justice views the problem.

tiff and by those similarly situated. Since the prayer of petitioner's complaint is $175,000 the balance of the amount is for the claims of those similarly situated.

3. Ever since the passage of Concurrent Resolution of August 1, 1953, 67 Stat. B132, it has been the declared policy of the Congress that Indian tribes in general throughout the United States "should be freed from Federal supervision and control * * *." The formula, so far developed by the Department of the Interior and the Congress, has been for the purchase of the Indian reservations by the United States from the Indians, as witness the Menominee Tribe of Wisconsin and the Klamath Tribe of Oregon. Other termination efforts which are pending and presumably will be effected in the near future are set forth in the footnote.[3]

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[3] 25 U.S.C. Code—

Sec. 677—Distribution of Assets between Mixed-Blood and Full Blood Members of Ute Tribe; Termination of Federal Supervision over Property of Mixed-Blood Members—Aug. 27, 1954

Sec. 691—Termination of Federal Supervision Over Western Oregon Indians—Aug. 13, 1954

Sec. 721—Termination of Federal Supervision Over Alabama and Coushatta Indians (New)—Aug. 23, 1954

Sec. 741—Termination of Federal Supervision over Paiute Indians—Sept 1, 1954

Sec. 791—Termination of Federal Supervision over Wyandotte Indians (New)—Aug. 1, 1956

Sec. 821—Termination of Federal Supervision over Peioria Indians (New)—Aug. 2, 1956

Sec. 841—Termination of Federal Supervision over Ottawa Indians (New)—Aug. 3, 1956

Sec. 891—Termination of Federal Supervision over Menominee Indians (New)—June 17, 1954

Sec. 931—Division of Assets of Catawba Tribe—Sept. 21, 1959

Sec. 951—Quapaw Tribe; Distribution of Judgment Fund—July 17, 1959

For defining the rights between the tribe as such and its members in the matter of compensation for their respective interests in such reservations, there is no authoritative decision to guide the administrative officials of the United States or to guide the Indians. Thus, if an occupant of tribal land who holds the same under the laws, usages and customs of the tribe has some quantum of interest in such land over and above those accorded him as a mere member of the tribe, he could assert the same against a condemnor of such land, as here, or a purchaser thereof.

In view of the contemporary trend toward termination of federal supervision over tribes and reservations in the United States, an authoritative decision recognizing and defining the rights between the tribes and their members is a matter of immediate importance nationally.

4. The Congress by a long series of statutes has recognized the legislative counterpart of what petitioners here seek judicially. The Choctaw and Chickasaw situation is illustrative. Article 33 of the Treaty of July 10, 1866, 14 Stat. 769, 778, provided that the unalloted lands of the Choctaw and Chickasaw Nation of Indians shall be "*the common property*" of the same. In due time civilization required that a railroad and telegraph line invade the Choctaw and Chickasaw reservation. The Congress by the Act of August 2, 1882, Ch. 371, Section 3; 22 Stat. 181, 182, decreed in part as follows:

> "Provided, that before the construction of said road through any *lands held by individual occupants according to the laws, customs, and usages of said Nations*, full compensation shall be made to such occupants for all property to be taken or

damages to them by reason of the construction of the said road and telegraph line." (Emphasis supplied)

If Congress require that a privately owned public utility pay individual Indians who hold *unallotted* tribal property according to the laws, customs and usages of such tribes for "all property" injured by such utility *in the possession of individuals*, it is apparent that the question here involved as to whether the United States should, by reason of the Fifth Amendment to the Constitution, be required by the courts to pay such individual Indians has real substance and is important.

The foregoing statute relating to the Choctaw and Chickasaw Nations has, as to other tribes, been re-enacted twenty-eight additional times by the Congress. A list of such re-enactments is set forth in the footnote.[4]

5. A careful analysis of *Cramer v. United States*, 261 U.S. 219, indicates that individual Indian families

[4] Act of August 2, 1882, 22 Stat. 181; act of July 4, 1884, 23 Stat. 99; act of July 4, 1884, 23 Stat. 73; act of June 1, 1886, 24 Stat. 73; act of July 1, 1886, 24 Stat. 117; act of July 6, 1886, 24 Stat. 124; act of February 24, 1887, 24 Stat. 419; act of March 2, 1887, 24 Stat. 446; act of February 18, 1888, 25 Stat. 35; act of May 14, 1888, 25 Stat. 140; act of May 30, 1888, 25 Stat. 162; act of January 16, 1889, 25 Stat. 647; act of May 8, 1890, 26 Stat. 102; act of June 21, 1890, 26 Stat. 170; act of June 30, 1890, 26 Stat. 184; act of September 26, 1890, 26 Stat. 485; act of October 1, 1890, 26 Stat. 632; act of February 24, 1891, 26 Stat. 783; act of March 3, 1891, 26 Stat. 844; act of July 6, 1892, 27 Stat. 83; act of July 30, 1892, 27 Stat. 336; act of February 20, 1893, 27 Stat. 465; act of March 2, 1896, sec. 3, 29 Stat. 40; act of March 18, 1896, sec. 2, 29 Stat. 69; act of March 30, 1896, sec. 2, 29 Stat. 80, 81; act of April 6, 1896, 29 Stat. 87; act of January 29, 1897, 29 Stat. 502; act of February 14, 1898, 30 Stat. 241; act of March 30, 1898, 30 Stat. 347.

are capable of asserting original Indian title. Admittedly, the *Cramer* case protected individual Indians whose rights were not "recognized" by a treaty. The case is, however, apposite on the issue that individual rights in tribal areas can exist. There the United States was suing as guardian for individual Indians, seeking to cancel a railroad patent covering the Indians' possessory rights. It appears from the Court of Appeals' opinion, 276 Fed. 78, 79, that the individual Indians were "remnants of a band that since 1859 have lived in a small valley in Siskiyou County, California." But it is to be noted the United States as guardian was representing the individual Indians in their capacity as individuals and not as a band or tribe.

Petitioners urge that their contention that it is factually and legally possible for individual Indians to hold rights in tribal areas has merit, should be examined by the Court, and should be answered definitively.

6. Counsel is well aware that this Court is concerned with policy and has had to adopt a rule that it will rely upon intermediate appellate courts for the correction of errors both of law and of fact. However, in reviewing a decision of the Court of Claims, it seems to counsel that the Court should adopt a modification of the foregoing rule. The Court of Claims is a *trial* court and therefore there is no intermediate appellate court to review its decisions. True it is that the Court of Claims has an examiner system by which trials are conducted by "commissioners." But these commissioners have only recommendatory authority. They cannot make findings of fact and they cannot make conclusions of law. The findings of fact made by such commissioners are in the form of proposals only and therefore, no matter how conscientious a commissioner

may be, he cannot by definition have the conscience of a court. The first and only court that has looked at this inquiry is the Court of Claims.

7. An odd situation here prevails. By its *findings of fact* the Court below has recited that petitioners are holding an exclusive right of possession which is *inheritable* in this property and that such right of inheritance is one which the Indians have observed from remote times up to the present day. (Transcript, pages 61, 76.)

In its *opinion*, the court below refused to regard the foregoing *Finding* as carrying with it a compensable interest in property because:

> "One cannot conclude from the Act authorizing payment and the contract otherwise than that the Congress, the Engineers and the Yakima Nation looked upon the fishing stations as the latter's property to be used as it might determine for its own benefit." (293 F. 2d 658, 661; Appendix 6a.)

and because:

> "Such communal holding of property is in accord with normal Indian custom." (Same pages.)

It may be observed here that the views of the Congress, the Corps of Engineers and the Yakima Nation (all of them self-serving) can hardly be determinative

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" Petitioners urge that the court's reliance upon "normal Indian custom" to the effect that all property rights in tribal areas are wholly owned communally is not persuasive because the findings in this very case indicate that tribal customs can vary from tribe to tribe, viz: Minnie Whitefoot here, according to the findings, had an inheritable and exclusive right of possession. Normal Indian custom is merely another manifestation of the evidenciary rule embodied in the phrase *res inter alios acta*. Proof of such a system of land ownership in other areas is simply no proof at all as to such a system in the instant lawsuit.

of the judicial question whether the exclusive inheritable right of possession is compensable. . .

The irreconcilability of the Opinion to the Finding was initiated by a legal blunder of the Corps of Engineers. Finding No. 18 of the Court below points up the fallacy as follows:

> "Throughout their negotiations with the Indians the Corps of Engineers proceeded on the basic premises (1) that a right to occupy a certain fishing location as recognized under tribal custom was not a property right susceptible to 'ownership' in a legal sense, because under neither Indian custom nor American law could such a right be conveyed or sold * * *."

For centuries a tenant holding an estate in fee tail could not alienate it either, but he had an inheritable and possessory right in the freehold. It is a blunder to make the right of conveyance the criterion of whether these Indians owned an interest in six fishing stations. Once the Court below found as a fact that Minnie Whitefoot had an inheritable right to occupy, use and fish from six fishing stations and to exclude others from them, it is a *non sequitur* to conclude as a matter of law that such rights were noncompensable when "taken" by the United States.

The dependence of the Court below on the opinion of the Congress, the Corps of Engineers and the tribal leaders seems almost an abdication of the judicial function. Once a *court* has found in fact an inheritable right in the occupancy of tribal property, then it should proceed to protect that right from legislative and administrative attempts to expropriate the same without compensation.

Minnie Whitefoot enjoyed the exclusive possession of this property during her lifetime until the United

States destroyed the same in 1957. "* * * (T)he right to use, occupy and fish from these locations" she "inherited through her father" who died in 1939 at the age of one hundred four years "and his mother before him." (finding 23c; Transcript, page 76.)

This is how the Indian people (as contradistinguished from the Congress, the Corps of Engineers and the tribal leaders) interpreted the 1855 treaty.

We must remember that *Shoshone v. United States*, 299 U.S. 476, holds that a mere right of occupancy, if recognized by the United States through a treaty as here, is protected by the Fifth Amendment to the U. S. Constitution when appropriated by the sovereign. In view of the importance that *Minor v. Happersett*, 21 Wall. 162, places on a "uniform practice long continued" as an aid to statutory construction, petitioners urge that there is a substantial question which should be resolved by this Court and that the decision of the Court below is probably in conflict with other applicable decisions of this Court.

CONCLUSION

The reasons that the petitioners advance for issuance of a writ of certiorari here may be summarized as follows:

This is a test case, involving five hundred similar claims and huge sums, a fact which is before the Court on the assertion of the petitioners and by the conduct of the Department of Justice in the management of the instant lawsuit.

The Indian reservations throughout the United States being in the process of liquidation, a decision defining property rights between the tribes and their respective members is a matter of national importance.

Although there is no decision squarely in point in upholding petitioners' claim, the Congress in 29 separate statutes has required privately owned public utilities to pay individuals for all possessory property rights in unallotted tribal areas when held according to their respective laws, customs and usages. *Cramer v. United States*, 261 U.S. 219, is implicit judicial recognition that the courts will protect individual rights in tribal areas and that the protection is factually and legally possible.

There is a *non sequitur* between the *findings* of the Court below which explicitly recognize an inheritable and exclusive family or individual right of possession in the tribal areas on the one hand, and the *opinion* on the other which concludes that such right does not exist and is noncompensable.

Petitioners urge that the instant action is one which has real merit and which has national importance in the administration of Indian affairs.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the Court of Claims

REED, Justice (Retired), sitting by designation.

This is a suit to recover compensation for the taking by destruction through inundation of certain fishing rights and other rights claimed as the individual property of plaintiffs in the Columbia River near Celilo Falls in the States of Washington and Oregon by the construction by the United States of The Dalles Dam, completed in 1956.

The plaintiffs are Indians enrolled in the Yakima Nation, a confederation created and granted a reservation by the Treaty between the United States and the Yakima Nation, June 9, 1855, 12 Stat. 951. By the treaty the various tribes composing the Nation gave up their claim by Indian title to a large expanse of territory over which they roamed in return for the United States' recognition of a portion of the area claimed under Indian title as a reservation for the Yakima Nation and its agreement to expend $200,000 for the Yakima's benefit, to furnish them schools, shops and a hospital, and to compensate individual Indians for substantial improvements, "such as fields enclosed and cultivated, and houses erected," made by such individuals upon tribal property. By this treaty the Yakima Nation secured rights recognized by the United States which could not be infringed without compensation.[1]

Then, as now, fishing in the Columbia for anadromous fish was important to the Indians and provided them their

[1] Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360; United States v. Shoshone Tribe of Indians, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213. See Crow Tribe of Indians v. United States, Ct.Cl. 284 F.2d 857, Ct. for taking by the United States of land held under Indian title, Tee-Hit-Ton Indians v. United States, 128 Ct.Cl. 82, 120 F.Supp. 202, affirmed, 348 U.S. 272, 282, 75 S.Ct. 313, 99 L.Ed. 314, et seq. See editor's comment on this case in Cohen, The Legal Conscience 39, and see idem 273 et seq., expressing a different view as to Indian title from the Tee-Hit-Ton case. See also comment on United States v. Alcea Band of Tillamooks, 341 U.S. 48, at page 273, 71 S.Ct. 552, at page 95, L.Ed. 738 of Legal Conscience.

food, fresh and dried, and a medium for acquiring other commodities. In the treaty, therefore, this provision was made in article III:

> "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." 12 Stat. 953.

Under this authority both Yakima Reservation Indians and Indians who live off the Reservation and around Celilo Falls have continued to fish at the Falls. Cf., United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089. Many of them, including plaintiff Minnie Whitefoot, claimed the exclusive right to fish at certain points or rocks away from their reservation called fishing stations. As the Commissioner found,

> "• • • the right of particular families in the tribe to use, occupy and fish from certain of the tribally owned fishing stations was a right which was respected and recognized by the Indians from remote times. This right of individual Indian families to use, occupy, and fish from specific fishing stations amounted primarily to a right, infrequently exercised, to exclude others from using the same stations. It was a right which the Indians recognized by custom and usage as passing down from one generation to the next through the family line. The right could not be sold or transferred by its immediate holder."[2]

[2] Finding of Fact 6 at end of this opinion.

With the growth of commercial fishing for canning purposes and the appearance of Indian fishermen without ancestral fishing stations, disputes arose as to the use of the stations. There were no records of the claimed rights. To meet this situation the Celilo Fish Committee, composed of three Indians from each of the affected reservations, plus representatives of nonreservation Indians, was organized through the local Indian Superintendents in 1935. Frequently the Committee used the "ancient Indian custom of inheritance and succession," to determine rights of fishing at stations.[3]

The growth of the Northwest and the increasing need for power and flood control caused Congress to enact water power legislation. The construction that is involved in this case is The Dalles Dam on the Columbia River between Washington and Oregon. Appropriation was made in 1950, 64 Stat. 279. Previously Congress had been advised of the fishery situation at Celilo Falls.[4] In an appropriation act for the civil functions of the Army, 1953, 67 Stat. 197, authority for compensation for the loss of the fishing rights in question was made. The act provided that, except in the case of Indians not enrolled in tribes, the payments were

[3] Findings of Fact 15-16.

[4] *Report of Chief of Engineers, United States Army, submitted June 28, 1949*, H. Doc. No. 531, 81st Cong., 2d Sess., vol. 7, 2808, 2951. Celilo Falls was named as a "usual and accustomed" fishing place.

"*Property right in the fish.* The Indians contend that they have a property right in the fish which migrate up the river, a right which may not be infringed upon without the payment of just compensation. The best that can be said for this question at the present time is that it is moot since the decision of the courts to date have pertained to easements in real property upon which the usual and accustomed fishing sites were located. * * * The Indian Service believe that the courts will hold that the treaties vested a property right in the annual fish migrations similar to that in the real estate upon which the fishing sites are located. The import and ramifications of such a holding are manifest. It is not believed that the treaties guarantee, or were intended to guarantee, annual fish migrations in the river in perpetuity, or that damages will be paid by the Federal Government for any diminution of these runs from whatever cause ensuing. * * *" Id., at 2951-2952.

to be made to the respective tribes, not to the individual fishermen.[1] Pursuant to this authority an agreement was reached between the United States and the Yakima Tribe on December 17, 1964. Paragraph 2 of the agreement provided for payment to the Tribe of some fifteen million dollars for all of its fishing privileges.

> "* * * as full consideration for the destruction or inundation of these usual and accustomed fishing stations within the area shown by shading upon Exhibit 'A' hereof and for the release and subordination hereinafter set forth in paragraph 5.
>
> * * * * * * * * * *
>
> "(d) Payment shall be made by depositing the amounts set forth in paragraphs 2(b) and 2(c) hereof, in the United States Treasury for the account of the Tribe, * * *.
>
> "(e) No payments will be made under the agreement for the real or personal property of individual members of the Tribe or for removal of cemeteries or burial grounds. * * [or] to the individual members of the Tribe for the cost of constructing or removing temporary fishing platforms as distinct from any compensable interest which individual members of the Tribe

[1] 67 Stat. 198: "*Provided further*, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the Government incident to the construction, operation, or maintenance of The Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

Substantially the same provision appears at 68 Stat. 331 in the similar 1954 Act.

may be able to establish in permanent fishing platforms, cableways and appurtenances."

"5. *Release and Subordination.* The Tribe, for and in consideration of performance by the Government of the obligations and terms hereof to be kept, observed and performed by the Government, by these presents for themselves and their agents, assigns or successors and for their people and their descendants forever, do hereby subordinate the rights of the Tribe to take fish and to build and maintain drying sheds at those usual and accustomed stations within the areas as shown shaded on Exhibit 'A' hereof, as reserved in the Treaty of June 9, 1855, 12 Stat. 951, to the right of the Government to construct, maintain and operate the project, and do hereby release and forever discharge the Government, its officers and agents, of and from all manner of action and causes of action, suits and causes of suit, debts, damages, charges, expenses, claims and demands whatsoever, which the said Tribe or their agents, assigns or successors or their people or their descendants may now or hereafter have by reason of or resulting from the construction, operation, and maintenance of the Project, * *".

This agreement was approved by the Yakima General Council and Tribal Council on December 17, 1954.

Minnie and Ambrose Whitefoot, members of the Yakima Tribe and residing on the Reservation, protested the per-capita distribution of the fifteen million dollar payment which gave $3,270 to each enrolled tribal member, including children of which the Whitefoots had five, on the ground of inadequacy, but accepted those portions of the money on the basis of economic necessity and without prejudice to this litigation. See Finding of Fact 22.

The respective exceptions to the Findings of Fact of the Commissioner have been examined. We are satisfied

that the findings are adequately supported by the record and we approve and adopt them as our own.

The basis of plaintiff Minnie Whitefoot's claim is that she was the owner of six "usual and accustomed fishing stations" descended to her as heir of her father, recognized as hers by tribal custom and used by her through the years.[6] Defendant denies that the right to use these stations exclusively rested in Minnie Whitefoot. The issue is whether the right to use these six fishing stations, with easements on the public lands at Celilo Falls no different from those of other similar stations, were her individual private property or a part of the communal property of the tribe. If Minnie's claim of private ownership is found correct, she would, she argues, be entitled to a payment for the value of the use of these stations.

We have heretofore called attention to the fact that the appropriation acts authorized payments to the tribes. Here it is the Yakima Tribe. The agreement of December 17, 1954, for payment of the fifteen million dollars, quoted above, was for the destruction of the usual and accustomed fishing stations preserved to the Yakimas by the treaty of June 9, 1855, Article III, quoted above. Paragraph 5 of that agreement of 1954, also quoted above, subordinated the rights of "the Tribe to take fish." One cannot conclude from the Act authorizing payment and the contract otherwise than that the Congress, the Engineers and the Yakima Nation looked upon the fishing stations as the latter's property to be used as it might determine for its own benefit.

Such communal holding of property is in accord with normal Indian custom. Land is so held whether by Indian

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[6] See Finding of Fact 23.

title or after creation of a reservation.[*] The general rights of the individual in tribal property are discussed in Federal Indian Law (1958), U. S. Government Printing Office, a revision and updating through the year 1956 of Felix S.

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[*] Pueblo Band of Potawatomi Indians v. United States, 143 Ct.Cl. 151, 165 F.Supp. 129, 147, certiorari denied, 359 U.S. 905, 79 S.Ct. 587, 3 L.Ed.2d 574: "The unbroken rule of law from Johnson v. M'Intosh, 8 Wheat. 543, 5 L.Ed. 681, to date is that Indian title, unrecognized by the United States by treaty or patent, covers the right to use only, a right that may be withdrawn by the Government at any time without liability for compensation." This right to use the land is however, the property of the land, tribe or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. No instance is known of individual ownership of tribal lands."

[*] Tee-Hit-Ton Indians v. United States, [128 Ct.Cl. 82, 120 F.Supp. 202], 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314; United States v. Band of Alsea Tillamooks, 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29, 103 Ct.Cl. 494, 59 F.Supp. 934], 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738. Cf. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985.

[**] Delaware Indians v. Cherokee Nation, 193 U.S. 127, 137, 24 S.Ct. 342, 48 L.Ed. 646; Sizemore v. Brady, 235 U.S. 441, 442, 35 S.Ct. 135, 59 L.Ed. 308; Cohen, Handbook of Federal Indian Law, 185, § 3, Eligibility to Share in Tribal Property. The Cherokee Trust Funds, 117 U.S. 288, 308, 6 S.Ct. 718, 727, 29 L.Ed. 880: "The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sale made of any part of them. He had a right to use parcels of the lands thus held by the nation, subject to such rules as its governing autonomy might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and title of the nation to the United States. * * * Their treaties of cession must therefore, be held not only to convey the common property of the nation; but to divest the interest therein of each of its members." 26 Op. Atty.Gen. 340, 348; Seminole Nation v. U.S., 90 Ct.Cl. 151; 78 Ct.Cl. 455."

Ghosty v. Tregg, 224 U.S. 665, 671, 32 S.Ct. 567, 568, 56 L.Ed. 941: "The individual Indian had no title or any visible right in the tribal property."

9 Op.Atty.Gen. 24, 28(5).

Cohen's Handbook of Federal Indian Law. A few excerpts will show the theory.[8]

In Powers of Indian Tribes, 55 Interior Dec. 14, 50, tribal powers over property are considered at length.

> "The powers of an Indian tribe with respect to tribal land are not limited by any rights of occupancy which the tribe itself may grant to its members. The proposition that occupancy of tribal land does not create any vested rights in the occupant as against the tribe is supported by a long line of court decisions: * * *." Page 51.[9]

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[8] Federal Indian Law, 440-441:

"The powers of an Indian tribe with respect to property, except as they may thus be limited by Congress, derive from two sources. In the first place, the tribe has, with respect to tribal property, certain rights and powers commonly incident to property ownership. In the second place, the Indian tribe has, among its powers of sovereignty, the power to regulate the use and disposition of individual property among its members.

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"* * * Except for these general limitations and other specific statutory limitations found in enrollment acts and other special acts of Congress, the proper authorities of an Indian tribe have full power to regulate the use and disposition of tribal property by the members of the tribe.

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"Repeatedly, in the situations above discussed, Federal and State courts have declined to interfere with the decisions of tribal authorities on property disputes internal to the tribe.

"It clearly appears, from the foregoing cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a land owner. In its quasi sovereign capacity and in the exercise of local self government, it may exercise powers similar to those exercised by any State or municipal corporation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress."

[9] See Sizemore v. Brady, 235 U.S. 441, 35 S.Ct. 135, 59 L.Ed. 308; Halbert v. United States, 283 U.S. 753, 762-63, 51 S.Ct. 615, 75 L.Ed. 1389; Journeycake v. Cherokee Nation, 28 Ct.Cl. 281, affirmed Cherokee Nation v. Journeycake, 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 120.

"Under these treaties, and in December, 1828, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was

While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian Law, supra, 757. As to fishing, this is true.[10] But, like the lands, the interests in the fisheries are communal, subject to tribal regulation.[11]

We hold that the use of accustomed fishing places, whether on or off the reservation, is a tribal right for adjustment by the tribe and that the fact that certain Indians have been allowed to have sole use of a particular spot by the Tribe gives that individual no property right against the Tribe and does not limit the Tribe's right to collect the damages for obliteration of fishing spots by the dam. We hold further that Minnie Whitefoot has no claim against the United States.

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reserved to the Cherokees as a nation; and no title was vested in severalty in the Cherokees, or any of them.", 155 U.S. at page 207, 15 S.Ct. at page 80.

Memorandum for the Commissioner of Indian Affairs, Law Governing Leases on the Palm Springs Reservation, Oct. 21, 1938, and the Solicitor's memorandum of Aug. 11, 1937, take the same view. The latter ruling says: "All the decided cases take the view that the occupant of tribal land has no vendible interest therein but merely a usufructuary right, and that control over the land remains in the tribe save as such control has been limited by certain statutes affecting the sale and leasing of tribal land." See The Prairie Band of Potawatomi Indians v. United States, supra note 7.

[10] "It is plain that there are only a comparatively small number of fishing locations upon the river within the reservation, and that, broadly speaking, the fishing rights upon the river belong to the tribe; but there can be fishing in the river without granting exclusive rights to defined locations.

"It does not follow, from the described conditions, that the individual Indian who wants to fish in that stream can be denied in order that, to his exclusion, fishing may be carried on for commercial purposes, in part, for the benefit of Indians of the tribe who do not care or who are not able to fish. The treaty was with the tribe; but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe—a right to a common as the right of an individual of the community." Mason v. Sams, 9 Cir., 5 F. 2d 255, 258. See United States v. Brookfield Fisheries, D.C., 24 F.Supp. 712, 716 (6); Sanford Bros. Co. v. United States, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 535; Klamath Terminal Legislation, 62 Interior Dec. 186, 203; Dukes v. Goodall, 5 Indian Territory Rep. 145.

[11] Cf. Tulee v. State of Washington, 315 U.S. 681, 62 S.Ct. 862, 86 S.Ct. 1115.

The claim of plaintiff Ambrose Whitefoot does not involve fishing rights. His claim is for the alleged taking of two cableways leading from islands in the Columbia to the shore. Ambrose erected these cables in 1947 with the written permission of the Corps of Engineers and used them to carry fishermen and their catches across the river. Ambrose did not own the land where the cables were located, and, so far as the record shows, ownership of the land rests in the United States free of Indian title since 1855 when that was extinguished by treaty. Ambrose himself did not fish near the cables. According to Finding 24, the fishermen "in return for use of the cable * * * would sell their catch to the plaintiff [Ambrose] who then resold in the comercial marekt." Plaintiff removed the cables in 1956 when the flooding of the area was imminent. His claim for the alleged "value of the installation and loss of prospective profits over a ten year period" was rejected by the United States.

We may assume, without deciding the question, that compensation is recoverable in proper cases for destruction of cableways under the provision in paragraph 2(e) of the 1954 agreement for "fishing platforms, cableways and appurtenances." This, however, is clearly not such a case, for Ambrose has failed to establish that he has been deprived of "any compensable interest" in his cableways, as he must do to recover under paragraph 2(e). He has removed and salvaged his cables and machinery. The going concern value of the apparatus and the expectation of future profits have, of course, been lost but the evidence is all to the effect that such value existed only at the sufferance of the United States. Ambrose had no claim to the land to which the cables were affixed, and there is no indication that he had or claimed any right, under contract, custom, or adverse possession,[12] to remain on the land for

[12] See, e.g., United States v. 7,403.5 Acres of Land, 4 Cir., 97 F.2d 417.

any purpose. When the Government, for good reason, with
drew its permission to remain, he did not become entitled
to compensation.

The petition must be dismissed.

It is so ordered.

JONES, Chief Judge, and DURFEE, LARAMORE and MARION, Judges, concur.